



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Federal Computer Corporation

**File:** B-239432

**Date:** August 29, 1990

David Kovach, Esq., for the protester.  
Robert P. Reznick, Esq., Clifford & Warnke, for Eastman Kodak Company, an interested party.  
Theresa A. McKenna, Esq., and Stephen E. Katz, Esq., Department of the Navy, for the agency.  
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest of rejection of proposal and award to another firm filed within 10 working days of receipt of notice of award is timely under our Bid Protest Regulations.
2. The procuring agency properly rejected the protester's proposal for automated publishing and printing systems as technically unacceptable where the protester took exception in its best and final offer to the material solicitation term that it guarantee the availability of spare parts for 5 years and where the protester did not respond to deficiencies in its software noted by the agency during discussions.
3. Protest that the awardee's offered equipment does not satisfy a specification requirement that the scanner read and format subscript and superscript is denied, where the protester was not prejudiced by the agency's relaxation of this requirement.
4. Protest that the awardee's equipment failed to comply with specification requirements for an automated publishing and printing system is denied where the record shows that the awardee's proposal was reasonably evaluated as meeting the requirements.

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## DECISION

Federal Computer Corporation (FCC) protests the award of a contract to Eastman Kodak Company under request for proposals (RFP) No. N00123-89-R-0454, issued by the Naval Regional Contracting Center, Long Beach, California, Department of the Navy, for an automated publishing and printing system. FCC protests that the Navy unreasonably found its proposal to be technically unacceptable and that it is entitled to award as the low-priced offeror. The protester also argues that award to Kodak was improper because Kodak's proposal was technically unacceptable.

We deny the protest.

The RFP contemplated the award of a fixed-priced contract for an off-the-shelf, automated publishing and printing system, including maintenance and training for a base year and 4 option years. The system required by the RFP consists of composition workstations, hard disks, a magnetic tape drive, laser printers, file servers, a text and graphics scanner, communications modems, networking, and composition and communications software.

The solicitation listed detailed performance and function specifications for the system and provided that the system must be capable of integrating word processing and other document authoring methods with electronic document creation through keystroking, scanning, and telecommunications. In addition, the RFP required that the contractor perform preventative and remedial maintenance, which included a 2 hour response to calls for remedial maintenance, and that the contractor guarantee the availability of replacement parts for the system for a minimum of 5 years from the date of the contract. Offerors were informed that contract award would be made to the responsible offeror submitting the lowest evaluated priced, technically acceptable proposal.

The Navy received proposals from FCC and Kodak and included both proposals in the competitive range. Kodak's proposal was found technically acceptable and FCC's proposal was found unacceptable but susceptible of being made acceptable.<sup>1/</sup> FCC's initial technical proposal was found

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<sup>1/</sup> The Navy found the hardware offered by both FCC and Kodak to be technically acceptable.

unacceptable for deficiencies in the areas of software, maintenance, and training support. Under the software requirements, the Navy determined that FCC's initial proposal did not fully address: (1) its software capability to handle standard generalized markup language (SGML) coded documentation,<sup>2/</sup> (2) the interactive spelling detection and correction features of its scanner's software, and (3) its composition software's ability to create equations on-line and alphanumeric bar code symbology. The Navy also found that FCC had not specified how it intended to meet the RFP maintenance requirements and had not provided sufficient information to evaluate its training program.

Discussions were conducted with each offeror and best and final offers (BAFO) received. FCC's evaluated BAFO price was \$558,451.30, while Kodak's evaluated BAFO price was \$678,135.60. Upon evaluation of BAFOs, the Navy determined that Kodak's revised proposal was acceptable and FCC's revised proposal was technically unacceptable. The agency found that FCC had failed to address any of the deficiencies identified in its proposed software. In addition, FCC's BAFO took exception to the RFP requirement that the contractor guarantee the availability of replacement parts for a minimum of 5 years.

Contract award was made to Kodak on March 22, 1990, and FCC protested to our Office on April 26. On May 24 the Navy, in an attempt to settle the protest, conducted an operational capability demonstration (OCD), or benchmark, of Kodak's proposed scanner to demonstrate compliance with the solicitation specifications.<sup>3/</sup> The contracting officer determined that, while the Kodak scanner "did not appear" to recognize, mark and retain the original format of subscript and superscript as scanned,<sup>4/</sup> this deficiency was "considered de minimis" since the agency had little need for

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<sup>2/</sup> "SGML," standard generalized markup language, is an international standard within the publishing industry which enables any publishing system to accept and understand data from other systems.

<sup>3/</sup> The RFP also provided that the agency reserved the right to require a successful, on-site OCD before making award.

<sup>4/</sup> "Subscript" are characters that appear below the line of text while "superscript" refers to the characters that appear above the text line (e.g., degree symbols).

this requirement and the scanner otherwise satisfied the material requirements of the RFP.<sup>5/</sup>

The Navy and Kodak initially argue that FCC's protest is untimely because FCC failed to protest within 10 working days of the date on which it learned the basis of its protest. See 4 C.F.R. § 21.2(a)(2) (1990). The Navy contends that on March 26 it informed FCC that Kodak had received the award but FCC waited until April 26 to file its protest. FCC replies that on March 26 it was told that Kodak's evaluated price was below FCC's and that it was not until the protester's receipt of the agency's written notification of award, on April 17, that FCC learned that its proposal had been found unacceptable and that Kodak's evaluated price was substantially higher than FCC's. FCC argues that after receipt of the award notification letter it investigated Kodak's equipment and concluded that Kodak's proposed scanner could not satisfy the RFP requirements. FCC's protest was filed 7 working days after receipt of the letter.

We find that FCC's protest was timely. Regarding FCC's protest that the agency unreasonably found its proposal to be unacceptable, FCC did not learn that its proposal was found unacceptable until April 17 and its protest on this issue was filed within 10 working days of that date. With regard to the acceptability of Kodak's proposal, FCC had no basis to question Kodak's equipment until it learned that Kodak's offer was higher priced than FCC's and that FCC's proposed system was found unacceptable.

FCC protests that the Navy unreasonably found its proposal to be unacceptable. We find, however, that the Navy properly rejected FCC's proposal as technically unacceptable since FCC took exception to a material solicitation term and because FCC did not respond to deficiencies in its software noted by the agency during discussions.

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<sup>5/</sup> The Navy states that the protester agreed, in consideration for the agency's agreement to conduct a benchmark of Kodak's scanner, to withdraw its protest if the Kodak scanner met the contract requirements. The agency contends that Kodak's scanner satisfied the contract requirements and requests that we enforce the parties' agreement. However, the parties disagree as to whether Kodak's scanner satisfied the contract requirements. In any event, our bid protest function does not contemplate the enforcement of private agreements between the parties.

With regard to FCC's exception to the replacement parts guarantee, the RFP required that "[t]he contractor guarantee that replacement parts of each machine listed in this contract shall be available for a minimum of 5 years from the date of the contract." FCC, in its initial proposal, indicated its understanding of, and certified compliance with, this requirement. The protester in its BAFO provided:

"FCC will provide adequate replacement parts to provide the services herein at no additional cost to the government. However, in the event any supplier of spare parts discontinues its support to FCC, the government agrees to furnish FCC adequate spare parts for the remainder of the contract at the rates equivalent to those that FCC had been paying to the equipment supplier."

FCC argues that the above-quoted BAFO language does not affect its promise in its initial proposal to comply with the maintenance requirements of the RFP. We disagree. The solicitation statement of work provides that the contractor's obligation to perform remedial maintenance includes arriving at the maintenance site with all necessary parts to effect repair. The offeror's guarantee of the availability of replacement parts for 5 years from the date of the contract award is obviously intended to ensure that the replacement parts, necessary to repair or maintain the system, are available through the base and option years of the contract. FCC, in its BAFO, has attempted to limit its liability by shifting the risk of nonavailability of replacement parts to the government.

In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is unacceptable and may not form the basis for award. Martin Marietta Corp., 69 Comp. Gen. 214 (1990), 90-1 CPD ¶ 132. The requirement that offerors guarantee the availability of replacement parts is clearly material, and FCC's exception to this requirement rendered its proposal technically unacceptable. While it is true, as noted by FCC, that the Navy did not identify this deficiency in informing FCC that its proposal was technically unacceptable, the record shows that the agency's evaluators, in reviewing FCC's BAFO, considered FCC's deviation from this requirement to be a material exception to the RFP

requirements. In any event, even if the agency had not discovered this deficiency until FCC's protest to our Office, an agency may properly raise new deficiencies in demonstrating the reasonableness of its unacceptability determination. See Burnside-Ott Aviation Training Center, Inc.; Reflectone Training Sys., Inc., B-233113; B-233113.2, Feb. 15, 1989, 89-1 CPD ¶ 158.

The Navy also found FCC's BAFO to be technically unacceptable because it failed to respond to the Navy's technical concerns regarding FCC's software that were expressed during discussions.<sup>6/</sup> As detailed above, the agency's technical evaluators found that FCC's initial proposal failed to address certain essential software requirements. The Navy conducted discussions with FCC regarding each of these perceived deficiencies. Although FCC contends that it adequately responded in its BAFO to each of the agency's discussion questions, our review of FCC's BAFO indicates that it did not address in any way the Navy's technical concerns.<sup>7/</sup> While FCC made general promises in its initial proposal to provide software that would satisfy contract requirements, the RFP required that technical proposals contain sufficient detail to indicate the offeror's proposed means to satisfy all applicable specification requirements and that statements that the offeror understands and will comply with specification requirements would be considered insufficient. FCC's promises to provide software meeting the contract requirements did not satisfy its obligation to provide sufficient information to demonstrate its capability to perform, especially considering that these matters were brought to its attention during discussions. See Federal Servs., Inc., B-235661, Aug. 28, 1989, 89-2 CPD ¶ 182. Thus, for this reason too, the Navy properly determined that FCC's proposal was technically unacceptable.

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<sup>6/</sup> The Navy also informed FCC that its proposal was found unacceptable because FCC's proposed computer did not have high-speed memory caches. The Navy now admits that the RFP does not require that the computer have high-speed memory caches.

<sup>7/</sup> The protester submitted to us exhibits, which it contends are pages from its BAFO. From our review of the protester's proposal and BAFO, we find that the exhibits are actually pages from its initial proposal.

FCC protests that Kodak's proposal was technically unacceptable. Specifically, the protester contends that Kodak's offered scanner cannot perform several of the specification requirements and that Kodak's offered printer and composition software must be unacceptable because Kodak offered the same printer and software as FCC's, which the Navy found unacceptable. In addition, FCC argues that Kodak's proposed system is not "off-the-shelf" as required by the RFP.

FCC first argues that Kodak's scanner, as shown by the post-award benchmark, cannot recognize and mark subscript and superscript and retain the original format as required by the RFP.<sup>8/</sup> The Navy contends that its award decision was based upon Kodak's proposal which took no exceptions to the RFP requirements. The Navy argues that since the post-award benchmark was conducted solely to resolve the protest it is unrelated to its award decision. The agency contends that questions concerning whether Kodak will deliver a scanner which satisfies the specification requirements are matters of contract administration which we do not ordinarily review. See 4 C.F.R. § 21.3(n)(1).

We do not agree with the Navy that the benchmark here concerns a matter of contract administration since the agency conducted the benchmark on Kodak's scanner in order to validate its award decision. Accordingly, the agency

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<sup>8/</sup> This contention is based upon the documented observation of the contracting officer, who stated this was a deficiency but was de minimis. FCC interprets the contracting officer's statement to mean that the Kodak scanner could not mark and recognize subscript and superscript and also could not retain the format of documents as originally scanned. Obviously, if a scanner is totally unable to retain the format of scanned documents, this would be a major deficiency. We think FCC misconstrued the clear meaning of the contracting officer's statement. The agency explained that this statement concerning the retention of format by Kodak's scanner at the benchmark referred to the ability of the scanner to retain the format of the subscript and superscript as originally scanned (i.e., maintain the position of the character above or below the text line).

cannot ignore the results of its benchmark in considering the reasonableness of its source selection.<sup>9/</sup>

The Navy contends that the failure of Kodak's scanner at the benchmark to mark, recognize, and retain the format of subscript and superscript does not render Kodak's proposal technically unacceptable overall. The agency states that it has little need for this requirement as less than 1 percent of all documents to be scanned will contain subscript or superscript. In any event, the agency contends that Kodak's scanner can mark, recognize and retain the format of subscript and superscript with minimal operator intervention and this will meet its minimum needs. In this regard, the agency states that FCC's scanner marks and recognizes subscript and superscript in the same way as Kodak's proposed scanner which requires some operator intervention.

The Navy's conclusion that the Kodak scanner's ability to scan for subscript and superscript with minimal operator intervention meets its minimum needs is reasonable. Nevertheless, this limitation on the ability of Kodak's scanner to mark, recognize, and retain format of subscript and superscript is a deviation from the RFP specifications. This would warrant sustaining a protest if there was resulting prejudice to the protester, e.g., if the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirement. See Warren Elec. Constr. Corp., B-236173.4; B-236173.5, July 16, 1990, 90-2 CPD ¶ \_\_\_\_\_. In this case, FCC was not prejudiced by the Navy's relaxation of this requirement.

FCC's proposal was found technically unacceptable for reasons unrelated to the requirement that the scanner mark and recognize subscript/superscript and FCC has not asserted that it would have changed its proposal to its competitive advantage if notified of the relaxation of the subscript/superscript scanner requirement. Nor has FCC asserted that it would have corrected the deficiencies pointed out by the Navy if given the opportunity for further discussions. To the contrary, the protester argues that its

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<sup>9/</sup> Benchmark tests should be conducted prior to the receipt of best and final offers in a negotiated procurement so that system deficiencies which are likely to occur during the test can be pointed out and possibly remedied. See CompuServe Data Sys. Inc., 60 Comp. Gen. 468 (1981), 81-1 CPD ¶ 374.



proposal should have been found acceptable despite the identified deficiencies. Also, the protester has not responded to the agency's statement that FCC's scanner will mark and recognize subscript/superscript in the same way as Kodak's scanner. Under the circumstances, we find that FCC has not been prejudiced by the Navy's relaxation of this requirement.

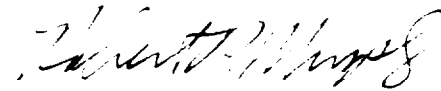
FCC argues that Kodak's scanner cannot satisfy numerous other specification requirements, including the ability to automatically feed documents, recognize and transfer bold and italics without operator intervention, "learn" new fonts, maintain recognition logic and correctly interpret the full set of greek and mathematical symbols. Kodak, in its proposal, stated that its scanner would fully perform each of these functions, and the agency states that Kodak's scanner successfully performed these functions at the post-award benchmark. We find that the Navy reasonably determined that Kodak's proposal satisfied these requirements; the protester's disagreement does not show that the agency's technical evaluation was unreasonable. See Pitney Bowes, Inc., B-236302, Dec. 4, 1989, 89-2 CPD ¶ 511.

FCC also contends that since its proposal was found to be unacceptable because of a deficiency in its composition software regarding the creation of on-line equations and bar code symbology, Kodak's proposal must similarly be unacceptable. FCC argues that the ability to create bar code symbology is provided by its printer and printer operating software and it offered the same printer and operating software as Kodak.

While it is true that FCC and Kodak offered the same Kodak model printer, Kodak offered an optional, customized version of the printer, which interfaced with Kodak's composition software to provide for the bar code capability. FCC, although it now argues that its system will meet this requirement through its printer and printer operating software, actually proposed to meet this requirement with its composition software, which is not the same composition software package offered by Kodak. In any event, FCC's proposal was reasonably found unacceptable because, among other things, the Navy could not determine how FCC could meet this requirement using the composition software it proposed and FCC failed to respond to the Navy's specific discussion questions in this regard.

FCC also protests that Kodak's offered equipment was in the developmental stage and thus not "off-the-shelf" as required by the RFP. This argument is also without merit. The Navy states that it confirmed that all of Kodak's proposed hardware was commercially available. Furthermore, we find from our review of Kodak's proposal that Kodak did not offer hardware for which development was proposed or required. In this regard, Kodak states that the integrated publishing system which it offered to the Navy is sold commercially from its Rochester, New York, headquarters.

The protest is denied.

  
James F. Hinchman  
for General Counsel